IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Harrisonburg Division

CHRISTY B. DOWNS,

Plaintiff,

v. Civil Action No: 5:13CV00083

WINCHESTER MEDICAL CENTER, *et al.*,

Defendants.

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS, IN PART, PLAINTIFF'S SECOND AMENDED COMPLAINT PURSUANT TO RULE 12(b)(6)

Defendants, Winchester Medical Center ("WMC") and Valley Health System ("VHS"), by counsel and pursuant to Federal Rule of Civil Procedure 12(b)(6), move to dismiss Count I and the punitive damages portion of Count III of the Second Amended Complaint filed by the Plaintiff, Christy B. Downs, on the following grounds.

INTRODUCTION

By Order set forth from the bench on February 6, 2014, the Court dismissed Counts I and III of the Plaintiff's Amended Complaint and granted Plaintiff leave to amend. (ECF Doc. No. 29). Plaintiff filed a Second Amended Complaint containing the same two counts, specifically, Count I, a claim that Defendants unlawfully interfered with Plaintiff's right to benefits available under the Family and Medical Leave Act ("FMLA"), and Count III, a claim that Defendants discriminated against Plaintiff in violation of the Americans with Disabilities Act ("ADA"), which includes a request for punitive damages.[1]

Despite Plaintiff's recent amendments to her pleading, Count I continues to suffer from a fatal deficiency, namely, Plaintiff's failure to allege that she was ever denied a benefit available to her under the FMLA, a required element of her *prima facie* case. The punitive damages claim encompassed in Count III also remains unsupported by factual allegations that would allow for the recovery of punitive damages, which are available only for malicious or recklessly indifferent conduct, terms of art under the ADA which require more facts than Plaintiff has alleged in order to be established. Plaintiff's inability to amend her pleading to correct these deficiencies should result in dismissal of Count I and the punitive damages portion of Count III.

RELEVANT FACTS

Plaintiff alleges she was employed by VHS and WMC and that she used intermittent leave available under the FMLA due to her migraine headaches. (SAC ¶¶ 14, 18).[2] Her use of FMLA leave increased in 2010. (SAC ¶ 19). Plaintiff claims that, "in connection with her increased use of FMLA leave," her supervisor, Dena Kent, began verbally abusing her and treating her more harshly, and that Ms. Kent ultimately orchestrated Plaintiff's termination. (SAC ¶¶ 20, 22, 25, 28, 29, 30, 32). Plaintiff alleges that these actions were motivated by the exercise of her rights under the FMLA. (SAC ¶ 36).

Plaintiff, however, does not allege that she was ever denied any of the benefits available to her under the FMLA. She instead expressly and repeatedly alleges that she "was approved" by Defendants for intermittent FMLA leave, and that "at all times relevant to this action,

[1] Count II asserts unlawful retaliation in violation of the FMLA. Defendants' motion does not address this Count and they have filed an answer to these portions of the Second Amended Complaint.

[2] Plaintiff actually was employed by Valley Regional Enterprises, Inc., a corporate subsidiary of VHS.

Defendant[s] continued to treat and deem Plaintiff as qualified for use of leave pursuant to the FMLA." (SAC ¶¶ 4-6, 9, 18, 19). Plaintiff does not allege that she was ever refused any of the FMLA benefits available to her, and her allegations demonstrate that she was allowed and actually used all of the leave that she requested.

Plaintiff supports her ADA claim by alleging that her migraine headaches constitute a disability, and that Defendants terminated her employment because of this disability. (SAC ¶ 39). She then requests an award of punitive damages in her prayer for relief. Although Plaintiff alleges Ms. Kent acted in a "willful and intentional" manner (SAC ¶ 34), she does not allege that Ms. Kent acted "maliciously" and she does not plead sufficient facts that would allow the inference that Ms. Kent was acting with awareness that she may have been violating federal law, the standard required to assess punitive damages.

STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(6) tests the sufficiency of the plaintiff's complaint. *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999). In determining whether a complaint is sufficient to state a cause of action, "district courts typically require[] plaintiffs to at least allege the elements of a *prima facie* case." *Obazee v. Wells Fargo Advisors, LLC*, 2010 U.S. Dist. LEXIS 92107, *10 (E.D. Va. Sept. 3, 2010). The failure "to allege all facts necessary to establish a cause of action" should result in dismissal. *Hairston v. Multi-Channel TV Cable Co.*, 1996 U.S. App. LEXIS 4854, *5 (4th Cir. Mar. 19, 1996).

ARGUMENT

Count I – unlawful interference with Plaintiff's FMLA rights – is not viable. The Second Amended Complaint lacks a required element to set forth such a claim, namely, that Plaintiff failed to receive or was sufficiently discouraged from using any of the benefits available to her under the FMLA.

The punitive damages portion of Count III is also deficient. As part of the grounds for their motion to dismiss Plaintiff's Amended Complaint, Defendants pointed out that Plaintiff had failed to plead either the rote phrase required for an award of punitive damages or any facts that would allow for such an award. (ECF Doc. No. 7). Despite the opportunity afforded Plaintiff to amend her pleading a second time, the punitive damages portion of her ADA claim continues to contain the same deficiency.

I. Count I – FMLA interference – cannot proceed

The FMLA prohibits an employer from interfering with an employee's FMLA benefits. 29 U.S.C. § 2615(a)(1). "To prevail on an FMLA interference claim . . . the employee must establish that . . . his employer denied him FMLA benefits to which he was entitled." *Burnett v. LFW, Inc.*, 472 F.3d 471, 477 (7th Cir. 2006) (citation omitted). Where there has been no denial, there is no interference claim. *Rasic v. City of Northlake*, 2009 U.S. Dist. LEXIS 88651, *29 (N.D. Ill. Sept. 25, 2009); *see also Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 89 (2002) (FMLA provides "no relief unless the employee has been prejudiced").

Here, Plaintiff does not allege that she was denied or discouraged from using any benefit available to her under the FMLA to her prejudice. In fact, she alleges that Defendants "approved" her use of intermittent FMLA leave and that, "at *all times* relevant to this action, Defendant[s] continued to *treat and deem* Plaintiff as qualified for use of leave pursuant to the FMLA." (SAC ¶¶ 6, 18) (emphasis added).

The allegations of the Second Amended Complaint do not set forth a viable FMLA interference claim. To the contrary, they show that Plaintiff received all of the benefits that she requested. Count I fails to state a claim upon which relief can be granted as a result.

II. The punitive damages portion of Count III is unsupported by sufficient factual allegations

Plaintiff requests an award of punitive damages in her prayer for relief. Such damages are available under the ADA where a plaintiff proves the defendant acted "with malice or with reckless indifference to [her] federally protected rights." 42 U.S.C. § 1981a(b)(1). The Second Amended Complaint does not contain the allegation that Defendants acted "with malice or with reckless indifference" to Plaintiff's rights. More importantly, it contains no *facts* specifically supporting such a conclusion.

Although "malice" and "other conditions of a person's mind may be alleged generally," Fed. R. Civ. Proc. 9(b), they still must be alleged. Plaintiff's Second Amended Complaint fails to contain even a recitation of the standard required for an award of punitive damages. The facts she does allege are insufficient to permit such an award. "The terms 'malice' or 'reckless indifference' pertain to the employer's *knowledge* that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination." *Kolstad v. ADA*, 527 U.S. 526, 535 (1999) (emphasis added). As the Supreme Court has recognized, "[t]here will be circumstances where intentional discrimination does not give rise to punitive damages liability under this standard." *Id.* at 536. Allegations that an employer acted "willfully" or "intentionally," as Plaintiff alleges, are insufficient to support a claim for punitive damages.

In the absence of either the elements required for an award of punitive damages, or the allegation of some facts reflecting that Ms. Kent knew she risked violating the ADA in taking the conduct averred in the Second Amended Complaint, the punitive damages request is unsupported by sufficient allegations and should be struck.

WHEREFORE, Defendants Winchester Medical Center and Valley Health System request entry of an Order dismissing Count I and the punitive damages portion of Count III of Plaintiff's Second Amended Complaint, with prejudice and without leave to amend, awarding Defendants their costs expended herein, and granting such further relief as the Court deems just and proper.

WINCHESTER MEDICAL CENTER
VALLEY HEALTH SYSTEM
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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of March, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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